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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1206

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation), et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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No.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of said Gilbert E. Thiel for a review on writ of certiorari of the decision of the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

STATEMENT OF MATTER INVOLVED.

On December 30, 1940 (R. 8) plaintiff filed a complaint in the State Court for damages against said "Southern Pacific Company, a corporation, First Doe, Second Doe and Third Doe, Defendants." (R. 9.) The important paragraphs here are as follows:

"I. That plaintiff does not know the true names of defendants sued herein as 'Does' and prays leave to insert same when ascertained." (R. 9.)

Paragraph III gives February 25, 1940 as date of the accident. (R. 10.)

"IV. That at said time and shortly thereafter, said defendant Company was informed through one of its regularly uniformed *special police officers* and by other of its agents that plaintiff was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors and that plaintiff should not be taken as a passenger or else should be guarded on his said proposed trip to San Francisco as plaintiff was in a highly depressed mental state over his marriage of a week before in said Reno and he might do something rash; that thereupon said *special officer* remained with plaintiff on the train for some time but then, *acting in a careless and reckless manner,* left him alone and unguarded before said train started for said San Francisco.

"V. That on or about 8:30 P.M. of said date while said train was in motion at or near the boundary line between the State of Nevada and the State of California, plaintiff, while out of his normal mind and

in said highly depressed mental state, suddenly opened the window of said train and leaping out, held on to said window sill with his hands for some time before falling to the ground; that one of defendant Company's regular *conductors* on said train saw plaintiff hanging from said window but *negligently and carelessly* failed to give the stop signal until after plaintiff had fallen to the ground." (R. 11.)

"VI. That said fall was caused by the *careless and reckless conduct* of *said defendants* who, with full knowledge of plaintiff's said condition, accepted him as a passenger and then carelessly and recklessly failed to take any reasonable precautions for his safety."

Paragraphs VII, VIII and IX set forth that both of plaintiff's legs got under the train and were amputated; that his left arm is permanently out of use; and the amount of plaintiff's damages.

Then the prayer seeks "judgment against *said defendants*". (R. 12.)

Said complaint contained no allegations regarding the citizenship or residence of plaintiff or said "police officer" or "conductor" and was not drawn technically in anticipation of a petition for removal.

On January 9, 1941 (R. 8) said defendant Company filed a petition for removal to the Federal Court alleging that it was a citizen of the State of Kentucky and that plaintiff was a citizen of the State of California. (R. 16.) No mention was made of the citizenship of said "officer" or "conductor". The sole

ground for removal in said petition was diversity of citizenship between plaintiff and defendant Company. No mention was made of a separable controversy between plaintiff and some of the other defendants. Paragraph IV of said petition admitted that plaintiff received injuries "as a result of alleged negligence of petitioner *and its agents,* as appears from the *complaint* herein". (R. 17.) Paragraph V thereof alleged that it was "impossible to tell from said complaint, or otherwise, what individuals are referred to by said fictitious designations 'First Doe, Second Doe and Third Doe' or any of them". (R. 17.)

On January 17, 1941 (R. 8) an order of removal was made (R. 26) over the formal objection of plaintiff who had obtained a short extension of time (R. 24) and was diligently endeavoring to ascertain the names and addresses of said "officer" and "conductor" and proceed in the State Court. (R. 58.)

After receiving notice of filing of the record in the Federal Court on February 13, 1941 (R. 2), plaintiff's counsel telephoned to Mr. A. B. Dunne, counsel for defendant Company on February 14, 1941, requesting information regarding the names and addresses of said "officer" and "conductor" and frankly stating that he would move for remand to the State Court as he believed they were California citizens, but he was refused and told to proceed by the usual method of interrogatories. (R. 58.) This was before the year limitation which would expire on February 25, 1941. On said February 13, 1941, said A. B. Dunne obtained a stipulation extending time for defendant

Company to plead until February 24, 1941, on which day it filed its answer. (R. 2.)

In paragraph II of said answer defendant Company "admits that one of its railroad *policemen* at Reno, Nevada, was informed on February 25, 1940, and prior to the departure from Reno, Nevada, of the train on which plaintiff rode, that plaintiff had been drinking alcoholic beverage, and admits that it was a fact that he had been so drinking". (R. 30.)

In paragraph III of said answer it admits "that defendant's *conductor* on said train saw plaintiff when plaintiff was partially through said window". (R. 30.)

On March 4, 1941 (R. 2), following the suggestion of defendant Company's counsel, plaintiff served interrogatories upon it seeking the names and addresses of said "officer" and "conductor". Defendant Company then took the deposition of plaintiff and by order of Court the answers to said interrogatories were not released and filed until April 30, 1941 (R. 3), when plaintiff learned their names and addresses and citizenship for the *first* time. Portions of said interrogatories, answers thereto, and deposition appear in the record. (R. 91-96.)

Immediately thereafter, on May 5, 1941 (R. 2), plaintiff moved for remand to the State Court alleging specifically that he had just discovered the name and address of said "conductor", sued as "First Doe", and since he and the plaintiff were both citizens of California, the Federal Court had no jurisdiction. (R. 36.) At the hearing the District Court commented that defendant Company was raising a

"technical" objection and then asked for briefs on the sole question of whether said "officer" and "conductor" being alleged as "Does" in said complaint could be considered on the petition for removal and on the motion to remand.

On May 17, 1941, plaintiff thereupon asked for leave to file a proposed amended complaint (R. 37), setting forth the true names of said "officer" and "conductor" and alleging that said "conductor" was a citizen and resident of the State of California and thus clearly establishing that there was no requisite diversity of citizenship. (R. 39-43.)

On May 29, 1941, the Court denied the motion to remand and the motion to file amended complaint. (R. 49.)

Plaintiff's counsel was advised by its clerk that the Court would not state nor discuss the grounds of its ruling. However, in defendant Company's lengthy brief it was strongly argued that the cause of action against said "officer" who was a non-resident (R. 91) was separable from that against said "conductor" and therefore the Federal Court had jurisdiction over the cause involving said "officer".

Thus, on June 4, 1941, plaintiff asked for leave to file a proposed (new) amended complaint (R. 49) which was similar to said amended complaint (R. 39) with the single exception that the following was added at the end of paragraph V thereof: "that said conductor knew before said accident that plaintiff was not in his normal mind and needed watching". (R. 51.) The stated purpose of this amendment was

to *clarify* and thus eliminate any question about said "conductor's" concurrent negligence with said "officer" in bringing about plaintiff's injuries and remand was again asked. (R. 50.)

On June 17, 1941, plaintiff also filed a formal answer to petition for removal and plea to the jurisdiction of the Federal Court. (R. 54.) Said answer set forth the utter impossibility of serving said "Doe" defendants (R. 54) and that plaintiff's intent from the beginning was to sue them all as joint defendants for concurrent negligence. (R. 55.) Plaintiff also denied any fraud. (R. 56.) Said plea set forth that plaintiff described said agents to the best of his ability and information (R. 57) and refers to the diligent efforts to get said information, even from defendant Company. (R. 58.)

At the hearing of said motions, upon inquiry of plaintiff's counsel, the District Court stated that its previous ruling was on the ground of *separability of causes of action* and it then asked for further briefs on this question. Plaintiff's brief pointed out that since defendant Company's petition for removal *failed* to allege the citizenship of either said "officer" or "conductor", there was no basis for removal to the Federal Court on the ground of separable causes, as it did not appear therein that either were non-residents.

On July 11, 1941, the Court denied said motions to amend and to remand, citing authorities which make it appear that it relied mainly upon the ground that said "officer" and "conductor" were not suffi-

ciently identified as parties in the original complaint and no amendment would be allowed to prevent the bar of the statute of limitations. (R. 61.)

Since the effect of said ruling was to make it impossible to ever bring said "officer" and "conductor" in as parties because the year limitation had run on February 25, 1941, and since the precise question here of the sufficiency of the pleading to make them parties has not been passed upon by the highest State Court, and since where the removal is improper, the action, in a legal sense, is still pending in the State Court, plaintiff filed a motion in the State Court to set aside its erroneous order of removal. (R. 67.)

Defendant Company petitioned for an injunction restraining further proceedings in the State Court. (R. 61.) At the hearing, the District Court admitted that its previous rulings were in effect a *dismissal* of the action against said "officer" and "conductor" and further stated that it had no doubts about its rulings, and after denying plaintiff's request to test out in the highest State Court the sufficiency of the pleading of said complaint as stating a cause of action against said agents, and to test out plaintiff's right under California Code of Civil Procedure Section 474 to sue a defendant as "officer" or "conductor" rather than as "First Doe" or "Richard Roe" since said section allows an unknown defendant to be sued by "any name", it granted the injunction. (R. 81.)

STATEMENT OF CIRCUIT COURT'S ACTIONS.

At the start of the oral argument, and without the slightest provocation, the presiding Judge of the Circuit Court who later wrote the opinion, most severely criticized plaintiff and asked: "Aren't the Federal Courts good enough to try your case in?"

This Supreme Court has repeatedly held that where plaintiff has a legal right to join a conductor, engineer or other agents of a railroad company as joint defendants, his motives in exercising that right cannot be questioned, even though they thereby prevent removal to the Federal Court.

Chesapeake & Ohio Ry. Co. v. Dixon, 179 U.S. 131, 135;

Chicago, R. I. & P. Ry. Co. v. Schwyart, 227 U.S. 184, 193;

Chicago, R. I. & P. Ry. Co. v. Whiteaker, 239 U.S. 421, 424, 60 L. Ed. 360.

Also,

Forrest v. Southern Ry. Co., 20 F. Supp. 851, 853,

and

Bagenas v. Southern Pacific Co., 180 F. 887, 889.

At no time did plaintiff question defendant Company's motives in obtaining removal to avoid trial in the State Court and in most vigorously contesting remand.

Also, the Circuit Court immediately took the decided position that plaintiff had no right of appeal

from said injunction and was about to summarily dismiss the appeal, but then, at defendant Company's suggestion, asked for further briefs on this point, without hearing any argument whatever from defendant Company. (R. 109.) A 43-page brief was filed by defendant Company urging that plaintiff *did* have the right to appeal. In its opinion the Circuit Court has not even mentioned this point. (R. 110.)

The Circuit Court's opinion has completely ignored the fact of the discovery of the "conductor's" California citizenship for the *first* time in the Federal Court *after* removal, although this was again called to its attention in the petition for rehearing. (R. 117.)

The Circuit Court considered *only* the original complaint and held, in effect: (1) That the "conductor" could not at all be identified nor was he even intended as a party defendant and (2) That after a petition for removal is filed, *Pullman v. Jenkins*, 305 U.S. 534, 537, 83 L. Ed. 334, forever forbids any amendments, even under the peculiar circumstances here. (R. 115.)

Plaintiff has been confronted with the obstacle of so many shifting theories from both the District and Circuit Courts that he has been left sadly bewildered in his attempts to enforce what appears to be his clear legal right to proceed with his case filed in the State Court.

JURISDICTION OF THIS COURT.

1. Jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 347 (a) to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit.

2. Said decision which petitioner seeks to have this Court review was entered on March 20, 1942. (R. 109.) A petition for rehearing was denied by order entered on April 15, 1942. (R. 117.)

3. This suit was commenced in the State Court but removed by defendant Company to the United States District Court (R. 13) under 28 U.S.C.A. Secs. 71, 72.

4. The decree of injunction of the District Court (R. 81) was appealed to the Circuit Court under 28 U.S.C.A. Sec. 227. It was also upon the authority of the following cases which point out that on said appeal the *whole basis* for the interlocutory injunction may be inquired into—that basis here being the District Court's denial of both motions to amend and to remand on the erroneous theory that it had jurisdiction:

Cray v. Hegarty, 2 Cir., 85 F. (2d) 516;
Morgan v. Kroger, 8 Cir., 96 F. (2d) 470;
Schell v. Food Machinery Corp., 5 Cir., 87 F. (2d) 385 (Cert. denied in 300 U.S. 679);
Borden v. Zumwalt, 9 Cir., 120 F. (2d) 69, 71;
Deckert v. Independence, 311 U.S. 282, 286-7.

QUESTIONS PRESENTED.

1. Where an original complaint filed in a State Court, names a railroad company and several "Does" as defendants, and charges one of the company's "special police officers" and "conductors" with definite and specific negligent acts causing injury to plaintiff but fails to immediately attach to them the technical words "First Doe" or "defendant", can it be properly and reasonably inferred, *on motion to remand* the case to the State Court, that said "conductor" and "officer" were intended as such "Does" and as joint defendants?

2. Where defendant Company's petition for removal to the District Court alleges that said agents are not parties defendant, and this is put in issue by plaintiff filing an answer to said petition and a plea to the jurisdiction setting forth his clear intent to make said agents joint defendants from the beginning and newly discovered evidence of their citizenship showing no diversity, and on plaintiff's motion to remand, defendant Company offers no evidence to the contrary, may the District Court completely ignore this evidence and maintain jurisdiction?

3. Did this Court intend in *Pullman v. Jenkins,* 305 U.S. 534, 537, in holding that after filing of a petition for removal, an amended complaint cannot be considered in determining the "right of removal", that plaintiff can never thereafter amend his complaint to correct technical errors, nor offer newly discovered or other evidence in the Federal Court showing that, from the beginning, there was no di-

versity of citizenship to give it jurisdiction? In other words, is Federal jurisdiction finally determined by a technical defect in the original complaint, without any right whatever to correct same after a petition for removal has been filed?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals that, on motion to remand, the original complaint stated no cause of action against the "Doe" defendants or against the "conductor" or "police officer" (R. 112) is extremely technical and unfair to plaintiff as it completely overlooks the fact that at least *some attempt* was made to make them joint defendants and, at most, there was merely a *technical* defect.

(a) This harsh construction is directly in conflict with our whole modern procedure and with the following Federal decisions which urge a liberal interpretation of the complaint, *on motion to remand,* with all inferences and doubts in favor of plaintiff to permit remand, keeping in mind that the complaint need not be perfect as amendments are now freely allowed to cure technical defects:

Pullman v. Jenkins (1938), 305 U.S. 534, 543: "We are not to decide whether a flaw could be picked in the declaration on *special* demurrer."

Chicago, R. I. & P. Ry. Co. v. Schwyart, 227 U.S. 184, 194;

Rhodes v. Dierks Lumber Co., 8 Cir., 108 F. (2d) 846, 848 (1940);

Locke v. St. Louis Ry. Co., 8 Cir., 87 F. (2d) 418, 420;

Johnson v. Missouri Pacific, 25 F. Supp. 692, 693;

Thurston v. Northwestern Fire, 9 F. Supp. 848, 854.

(b) The Circuit Court relied on cases like *Cella v. Brown,* 8 Cir., 144 F. 742 (R. 114), which do not apply here because said "conductor" and "officer" were not merely "formal parties" who might be disregarded on filing a petition for removal but were clearly singled out and charged with *specific* negligent acts *causing* plaintiff's injury. (R. 10, 11.)

2. In closing its eyes and completely ignoring the true facts, *undisputed in the record* AT THE TIME OF MOTION TO REMAND, showing plaintiff's intent from the beginning to join said "conductor" and "officer" as defendants, the Circuit Court is in direct conflict with all of the following decisions which hold that on motion to remand, the Court may look into the true situation between the parties and even take evidence, especially where plaintiff files an answer to the petition for removal and a plea to the jurisdiction thus raising issues of fact which *must* be tried in the *District Court only:*

Stone v. South Carolina, 117 U.S. 430, 432;

Farmer's Bank v. Atchison, etc., 8 Cir., 25 F. (2d) 23, 27;

Leonard v. St. Joseph Lead Co., 8 Cir., 75 F. (2d) 390, 395;

Morgan v. Kroger, 8 Cir., 96 F. (2d) 470, 473;

Polito v. Molasky, 8 Cir., 123 F. (2d) 258, 261 (Nov. 1941);
Sklarsky v. Grt. Atl., etc., 47 F. (2d) 662, 664;
Hughes, Fed. Prac., Vol. 4, Secs. 2671 and 2653 and cases cited.

Also, the burden of proof is on the petitioning defendant and where, as here, the issue is not tried, remand should be ordered.

Trivette v. C. & O. Ry. Co., 6 Cir., 212 F. 641, 643;
Wilson v. Republic Iron, 257 U.S. 92, 97;
Good v. Hartford Acc., 39 F. Supp. 475, 477 (1941).

(a) The Circuit Court has, in effect, denied plaintiff his right of appeal by totally ignoring this strongly urged and important legal point although it was plainly set forth in his statement of points on appeal (R. 86), in each of his four briefs and in the petition for rehearing. (R. 117.) By failing to even consider this important question, the Circuit Court has deprived plaintiff of "due process" as he has never had a full and fair hearing on the merits of his appeal which has been decided adversely to him.

3. The Circuit Court's decision misunderstands and misapplies *Pullman v. Jenkins,* 305 U.S. 534, 537. (R. 115.) That case holds that when a petition for removal is filed, plaintiff's later amendments cannot be considered in determining the *"right of removal".* It does not *forever* forbid any amendments, after removal to the Federal Court, based upon *newly discovered evidence* or even changes in parties so as to *permit remand* when the situation so requires.

(a) The Circuit Court is in direct conflict with the following cases which hold that amendments may be made after removal to the Federal Court and when it *then* appears that there is no diversity of citizenship, a remand may be ordered, based on the record as it then stands:

Solanics v. Republic Steel, 34 F. Supp. 951, 953 (1940);

Polito v. Molasky, 8 Cir., 123 F. (2d) 258, 261 (1941).

(b) The Circuit Court is in conflict with the following cases holding that where the citizenship of a party showing no diversity is first discovered or raised in the District Court, amendment may be allowed, and the case remanded or dismissed.

St. Louis Smelting v. Nix, 8 Cir., 272 F. 977;

Page v. Wright, 7 Cir., 116 F. (2d) 449, 453-4 (Cert. dismissed in 312 U.S. 710) and which discusses the new Federal Rules of Civil Procedure, 12 (h) (2) and 15 (b), in deciding that "diversity of citizenship" is included in the word "jurisdiction".

(c) The Circuit Court's decision has, in effect, forever tied the District Court's hands on all motions to remand so that it can no longer inquire into the true facts and allow proper amendment, and it has thus nullified 28 U.S.C.A. Sec. 80, which requires the Federal Court, even of its own motion, and *"at any time"* to order remand when it should appear that it has no jurisdiction.

(d) The filing of the petition for removal here has, in effect, *dismissed* the action against said "conductor" and "officer", whereas, if it were not filed, plaintiff would be allowed to amend in either the Federal or State Court as a *matter of course* to set forth their true names and pursue his action against them.

(e) Said holding in *Pullman v. Jenkins,* supra, involves an important question of Federal law which should be clarified and settled by this Supreme Court to prevent further misunderstanding and confusion which is already apparent in this case and from the contents of the cases cited above, or much mischief and harm will result. A construction of 28 U.S.C.A. Sec. 80 and of Rules 12 (h) (2) and 15 (b) of the new Federal Rules of Civil Procedure are also involved here.

4. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(a) Reference is hereby made to statement of Circuit Court's actions at the oral argument, as appears supra on page 9 hereof, showing a prejudicial attitude on its part which deprived plaintiff of a fair hearing on the merits before a Court not biased against plaintiff's desire to exercise his clear legal right to try his case in the State Court.

(b) The bias of the Circuit Court is further shown by its opinion. Its statement that "appellant *threatened* to and did attempt to prosecute his suit in the

State Court" (R. 110) is unjustified as appellant positively never made any "threats" but merely acted in good faith and with proper decorum at all times in pursuing his legal rights as he understood them. Its statement that appellant "showed no cause" before the injunction was granted (R. 111) is error because he vehemently argued (R. 71, 72, 81), cited cases, and stated that since the question involved was a doubtful and technical one of construction, even discretion should withhold the injunction so that the State Court could apply its local laws to an interpretation of the complaint.

Its statement of "appellant being under the *delusion* that he could thereby defeat the District Court's jurisdiction" (R. 115) further indicates the Court's improper attitude towards appellant's efforts to freely pursue his legal rights.

5. It is important that the question of jurisdiction involved here be determined *finally* and *now* by this Supreme Court so that, after the effort, agony and expense of a trial and verdict for plaintiff in the District Court, he may not be told later by the Circuit Court, on appeal, that the District Court never had jurisdiction because the complaint showed no separable controversy and an agent of the defendant railroad company is also a local resident, thus establishing no diversity. This situation actually occurred very recently in *Cheyne v. Atchison, T. & S. F. Ry. Co.*, 9 Cir., 125 F. (2d) 49 (Rehearing denied Feb. 1942), and also in *Atchison, T. & S. F. Ry. Co. v. Francom*, 9 Cir., 118 F. (2d) 712 (1941). In both

of said cases remand was ordered to the State Court after the plaintiff had obtained a verdict in the District Court. What a waste of time, effort and money for the Courts, the parties, their counsel and all concerned!

Wherefore, petitioner respectfully prays that the writ of certiorari be allowed and that said decision be reviewed and reversed.

Dated, San Francisco, California,
April 29, 1942.

ALLEN SPIVOCK,
JOHN L. MURPHY,
Counsel for Petitioner.